



## SMALL BUSINESS ADMINISTRATION

13 CFR Parts 120 and 134

RIN 3245-AH05

Implementation of the Small Business 7(a) Lending Oversight Reform Act of 2018

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: On June 21, 2018, Congress enacted the Small Business 7(a) Lending Oversight Reform Act of 2018, (“Act”). The purpose of the legislation was to increase the Small Business Administration’s (“SBA” or “Agency”) oversight capabilities and to ensure the integrity of the 7(a) Loan Program. The Act contains several new and strengthened authorities. Section 3 of the Act requires SBA to promulgate regulations to implement certain of the Act’s provisions. SBA is proposing this rule to implement the Act and to update the Agency’s regulations on supervision of all lenders participating in SBA’s business loan programs.

DATES: SBA must receive comments to the proposed rule on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN: 3245-AH05, by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Bethany Shana, Office of Credit Risk Management, Office of Capital Access, Small Business Administration, 409 Third Street SW, Washington, DC 20416.

- Hand Delivery/Courier: Bethany Shana, Office of Credit Risk

Management, Office of Capital Access, Small Business Administration, 409 Third Street SW, Washington, DC 20416.

SBA will post all comments on <https://www.regulations.gov>. If you wish to submit confidential business information (“CBI”), as defined in the User Notice at <https://www.regulations.gov>, please submit the information to Office of Credit Risk Management, Office of Capital Access, Small Business Administration, 409 Third Street SW, Washington, DC 20416. You are requested to highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination on whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Bethany Shana, Office of Credit Risk Management, Office of Capital Access, Small Business Administration, 409 3rd Street SW, Washington, DC 20416; telephone: (202) 205-6402; email: [Bethany.Shana@sba.gov](mailto:Bethany.Shana@sba.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background and History.

SBA is authorized under Sections 7(a) and 7(m) of the Small Business Act and Title V of the Small Business Investment Act of 1958 to conduct small business loan programs. 15 U.S.C. 636(a) and (m) and 695 et seq. SBA’s business loan programs provide critical access to credit for America’s small businesses, bridging the lending gap that exists in the market for our nation’s smallest companies. Along with the authority to

offer government guarantees, Congress provided SBA the authority to supervise lenders participating in these programs. 15 U.S.C. 634, 636, 650, and 697.

Growth in SBA 7(a) lending prompted Congress to undertake a thorough examination of the tools available at SBA to ensure that comprehensive oversight is accomplished.<sup>1</sup> Following that review, Congress enacted the Small Business 7(a) Lending Oversight Reform Act of 2018, Pub. L. 115-189 (June 21, 2018) (the “Act”). The Act strengthened SBA’s 7(a) Lender supervision authorities and the office charged with that responsibility, SBA’s Office of Credit Risk Management (“OCRM”). The legislation codified SBA’s authority to take informal enforcement actions against 7(a) Lenders, which currently includes, for example, supervisory letters, Board of Directors (“Board”) resolutions, and agreements. It also codified SBA’s broad authority to take formal enforcement actions against 7(a) Lenders. Those actions currently include, but are not limited to, portfolio guaranty dollar limits, delegated authority suspensions, program suspensions, and program revocations. To further strengthen 7(a) Loan Program supervision, the Act provided authority for SBA to assess civil monetary penalties (“CMPs”) against 7(a) Lenders. The Act also provided several other provisions that support SBA’s ability to perform effective 7(a) Loan Program supervision.

SBA’s lender oversight regulations are codified in 13 CFR part 120, subpart I (13 CFR 120.1000 through 120.1600). The recent legislation required SBA to promulgate regulations to implement certain provisions in the Act. Accordingly, SBA is publishing this notice of proposed rulemaking to implement the legislation and is also proposing to update its lender oversight regulations. The updates would include technical corrections and clarifications to better inform lenders and to strengthen enforcement. In keeping with

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<sup>1</sup> H. Rep. No. 115-655 at 6 (2018).

the purpose of the Act to increase SBA's oversight capabilities to ensure the integrity of the business loan programs while protecting taxpayer dollars, and because SBA's 7(a) oversight framework is generally interwoven with that of the 504 Loan Program and Microloan Program, SBA is proposing to extend some of the updates to Certified Development Companies ("CDCs") in the 504 Loan Program and Microloan Intermediaries ("Intermediaries") in the Microloan Program. A summary of key aspects of the proposed rule and a section-by-section analysis follows.

## II. Summary of Key Aspects of the Proposal.

The following is a summary of key provisions in the proposed rule. For a more detailed discussion of the proposal and each regulation, see the section-by-section analysis.

A. Codification of Informal Enforcement Tools (7(a) Lenders). Public Law 115-189 requires SBA to incorporate into SBA regulations SBA's informal enforcement tools for 7(a) Lenders. Such enforcement tools or actions currently include, for example, supervisory letters and agreements (e.g., voluntary withdrawal agreements and voluntary agreements for immediate suspension of secondary market sales). Proposed § 120.1300 would set forth SBA's proposed regulation on informal enforcement actions for 7(a) Lenders. It would identify the key informal enforcement actions that SBA may undertake. While most of the actions listed are not new and are currently in SBA's Standard Operating Procedure ("SOP") 50 53, Lender Supervision and Enforcement,<sup>2</sup> the proposed rule includes a few changes to the list as further discussed in the section-by-section analysis. Proposed § 120.1300 would also include the circumstances that SBA would

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<sup>2</sup> Available at <https://www.sba.gov/document/sop-50-53-lender-supervision-and-enforcement>.

consider in choosing to take informal action instead of formal action. The circumstances proposed would be largely the same as those that are currently in SOP 50 53.

B. Civil Monetary Penalties (7(a) Lenders). Congress reviewed the types of actions that SBA could take and found that “missing from OCRM’s toolbox is the ability to apply a civil monetary penalty” against all 7(a) Lenders.<sup>3</sup> Congress, therefore, established in the legislation general authority to impose civil monetary penalties (“CMPs”) against 7(a) Lenders. This authority is in addition to the limited authority that Congress granted SBA in 2004 to assess CMPs against SBA Supervised Lenders for reporting failures.<sup>4</sup> The general authority granted by the new legislation authorizes SBA to assess CMPs against a 7(a) Lender of up to \$250,000. Proposed § 120.1500(b)(2) would set forth SBA’s general authority to impose CMPs against 7(a) Lenders. Under the proposed regulation, CMPs would be assessed in an amount not to exceed the maximum published in the Federal Register from time to time, to allow for annual inflation adjustments as required by section 701 of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. 114-74 (November 2, 2015).<sup>5</sup> Assessment of CMPs would assist in protecting the integrity of the 7(a) Loan Program.

C. OHA Appeals (7(a) Lenders). The new legislation also provided 7(a) Lenders the ability to appeal most enforcement actions to either Federal district court or SBA’s Office of Hearings and Appeals (“OHA”). This provision is contained in proposed §§ 120.1300(c) and 120.1600(a)(5). SBA’s decision on the informal or formal enforcement action would remain in effect pending resolution of the appeal, which is consistent with

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<sup>3</sup> H. Rep. No. 115-655 at 14 (2018).

<sup>4</sup> See, 15 U.S.C. 650(j).

<sup>5</sup> CMP maximums for SBA Supervised Lender reporting failures also would be published in the Federal Register to allow for the required annual inflation adjustments. See proposed § 120.1500(c)(4).

the effect of appeals of secondary market suspension or revocation actions under current § 120.660. The proposed rule would also amend affected provisions in 13 CFR 134.102 and 134.205. Any further revision to part 134, if needed, would be contained in a separate rulemaking.

D. Microloan Intermediary Enforcement (Intermediaries). Under SBA's Microloan Program, SBA makes direct loans to Intermediaries, the proceeds of which are used to fund loans to small business microloan borrowers. The lending arrangement between SBA and the Intermediary is memorialized in a Loan Authorization and Agreement, Promissory Note, Security Agreement, and related documents. SBA can take action against an Intermediary under the Promissory Note and against SBA's collateral for defaults, including but not limited to, non-compliance with SBA loan program requirements. SBA also makes grants to Intermediaries and can take action against Intermediaries under applicable grant law. In addition, SBA may take formal enforcement action against Intermediaries under § 120.1540. The grounds for formal enforcement action against Intermediaries are set forth in 13 CFR 120.1425. The proposed rule would clarify § 120.1425 by regrouping some of the grounds and specifying other grounds consistent with those applicable to 7(a) Lenders and CDCs (together, "SBA Lenders"). It would also clarify § 120.1540, which covers types of formal enforcement actions against Intermediaries. In particular, the proposed § 120.1540 update would specify that SBA can undertake immediate suspension against an Intermediary, which may include but is not limited to the authority to make, service, liquidate, and/or litigate SBA microloans and to freeze an Intermediary's Microloan Revolving Fund and Loan Loss Reserve Fund accounts. It would also clarify that

program revocations may include portfolio surrender. In addition, the proposed rule would remove a few provisions that are covered elsewhere for Intermediaries.

E. Credit Elsewhere (SBA Lenders). Congress in the new legislation sought to update and modernize SBA's "foundational test" of eligibility (i.e., that the small business applicant cannot obtain the credit elsewhere on reasonable terms without the government guaranty).<sup>6</sup> Congress, therefore, codified in the legislation a new definition of credit elsewhere, clarifying many of the factors utilized in the definition. The new definition of credit elsewhere realigns the test to ensure it is based on a borrower's ability to obtain credit, rather than a lender's ability to offer credit. The proposed rule would update 13 CFR 120.101 to conform the section to changes in the definition of credit elsewhere contained in the new legislation.

F. Other Technical Amendments, Updates, and Clarifications (SBA Lenders and Intermediaries). The proposed rule would contain other technical amendments, updates, and clarifications: for example, the 13 CFR 120.10 definition for "Federal Financial Institution Regulator" would be updated to delete reference to the Office of Thrift Supervision as this agency has been abolished and merged into the Office of the Comptroller of the Currency and other Federal banking agencies. 12 U.S.C. 5412 and 5413. The definition for "Loan Program Requirements" would be clarified to apply to Intermediaries. In addition, SBA would delete reference to Non-lending Technical Assistance Providers ("NTAPs") throughout SBA's oversight regulations, as SBA has not issued technical assistance grants to NTAPs in many years and technical assistance grants are currently made to Intermediaries. SBA would also clarify in § 120.1000 that risk-based oversight includes monitoring. In addition, SBA would update and clarify

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<sup>6</sup> H. Rep. No. 115-655 at 15 (2018).

proposed § 120.1400(c)(9) to better inform SBA Lenders that their failure to properly oversee the activity of their respective Agents increases SBA's financial risk. Supervisory concern with lender failure to effectively monitor third-party activities has been increasing as financial institutions rely more heavily on third-party assistance.

### III. Section-by-Section Analysis.

A. Section 120.10 - Definitions. Proposed § 120.10 would update the definition of "Federal Financial Institution Regulator" to reflect elimination of the Office of Thrift Supervision. SBA would also update the definition of the "Lender Oversight Committee" to reference that membership and duties are derived from the Small Business Act, that the committee meets quarterly, and that it votes on formal enforcement action recommendations. In addition, SBA would clarify that the term "Loan Program Requirements" may also be referred to as "SBA Loan Program Requirements", would include Federal Register notices and applicable government-wide regulations in the definition, and would extend the definition to Intermediaries.

B. Section 120.101 – Credit Not Available Elsewhere. One of the primary goals of the new legislation is to ensure that the credit elsewhere test is being applied correctly and consistently by lenders and that it is being appropriately verified by SBA.<sup>7</sup> The proposed rule would codify in SBA's credit elsewhere regulation the new definition for credit elsewhere as contained in the legislation. Under § 120.101 as proposed, credit elsewhere would mean that credit is unavailable to the small business applicant on reasonable terms and conditions from non-Federal, non-State, and non-local government sources without SBA assistance, taking into consideration factors associated with conventional lending practices, including: (i) the business industry of the loan applicant;

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<sup>7</sup> S. Rep. No. 115-265 at 3 (2018).



(ii) whether the loan applicant has been in operation 2 years or less; (iii) the adequacy of collateral available to secure the loan; (iv) the loan term necessary to reasonably assure repayment of the loan from business cash flow; and (v) any other factor relating to the particular loan application that cannot be overcome except through obtaining a Federal loan guarantee under prudent lending standards. Examples of “other factors relating to the particular loan application” may include, but would not be limited to, management experience, leverage ratio, global cashflow, loan size relative to the age of the business, or the personal resources of the owners of the business, and must be specifically explained and documented with relevant supporting documentation in the lender’s credit memorandum. Section 120.101 as revised would continue to apply to all SBA Lenders, including CDCs.

C. Section 120.180 – Compliance with Loan Program Requirements. Sections 3 and 4 of the Act provide that SBA is to oversee compliance with SBA Loan Program Requirements, including credit elsewhere. SBA is proposing revisions to 13 CFR 120.180 to facilitate this oversight. The revisions would codify in § 120.180 SBA’s requirement that SBA Lenders maintain documentation to support that Loan Program Requirements, which would include credit elsewhere (as applicable), have been satisfied. SBA examines these documents during reviews and exams. This documentation would facilitate prudent lending and is a practice that all prudent lenders already undertake. The proposed rule would also clarify that Intermediaries, in addition to 7(a) Lenders and CDCs, are expected to comply with Loan Program Requirements and are covered by this regulation.

D. Section 120.1000 – Risk-Based Lender Oversight; § 120.1010 - SBA Access to SBA Lender and Intermediary Files; § 120.1015 – Risk Rating System; § 120.1025 –

Monitoring; § 120.1050 – Reviews and Examinations; and § 120.1051 – Frequency of Reviews and Exams. The proposed rule would update these sections to remove references to NTAPs, as SBA has not issued technical assistance grants to NTAPs in many years. Technical assistance in the Microloan Program is being administered directly by Intermediaries.

E. Section 120.1055 – Review and Examination Results. The Act provides that a 7(a) Lender's response to an exam or review is due no later than 45 business days after receiving the report from SBA. Currently, 13 CFR 120.1055 provides 7(a) Lenders, CDCs, and Intermediaries 30 calendar days to respond. Legislative history indicates that this provision was intended to extend the response timeframe. Proposed § 120.1055 would revise the timeframe from 30 calendar days to 45 calendar days. The revision would extend the time consistent with the statute and would be based on calendar days for ease of calculation. If a lender needs additional time, the lender may request the time and SBA could authorize it, as warranted. The proposed rule would clarify when a lender receives a report for purposes of this regulation (i.e., it is considered received on the date it is emailed to the last known email address for the SBA Lender or Intermediary, unless the SBA Lender or Intermediary can provide compelling evidence that it was received on a different date). Proposed revisions to § 120.1055 would also codify SBA's 90-day timeframe for lenders to implement corrective actions. The proposed rule would include flexibility to allow for a longer or shorter timeframe, as warranted. Codification would provide lenders notice in addition to that contained in the report transmittal letter and would strengthen compliance and consistency. The proposed rule would also clarify that the response must address (in addition to findings and corrective actions) SBA

recommendations, if any. In addition, proposed § 120.1055 would be updated to remove reference to NTAPs.

F. Section 120.1060 - Confidentiality of Reports, Risk Ratings and Related Confidential Information. The proposed rule would update this section to remove references to NTAPs, as SBA has not issued technical assistance grants to NTAPs in many years. Technical assistance in the Microloan Program is being administered directly by Intermediaries.

G. Section 120.1300 – Informal Enforcement Actions – 7(a) Lenders. The proposed rule would create a new section, § 120.1300, to codify SBA’s informal enforcement actions for 7(a) Lenders as required by the Act. Proposed new § 120.1300 would include a list of informal enforcement actions. The proposed list would be similar to that currently contained in SOP 50 53, with the addition of mandatory training and the removal of the headquarters meeting. SBA believes mandatory training would be a good addition to its informal tools, one that could assist lenders to efficiently and effectively resolve deficiencies and compliance issues. While SBA has found that a headquarters meeting can be a very effective oversight tool, such meetings are generally conducted during (and more aligned with) the earlier supervision phases of Monitoring or Increased Supervision. Accordingly, the proposed regulation on informal enforcement actions would not include a headquarters meeting. If this change becomes final, SBA would amend SOP 50 53 to move headquarters meetings to the Monitoring/Increased Supervision chapters. In addition, proposed § 120.1300 would describe the types of informal enforcement actions listed. Finally, it would discuss the circumstances in which SBA is likely to take informal enforcement action (e.g., when problems are narrow in

scope, are correctible, and SBA is confident of the 7(a) Lender's Board and management commitment and ability to correct such problems; where violations are less frequent or less severe but still warrant enforcement; or while SBA more fully assesses risk). These proposed circumstances are, for the most part, set forth in SBA's current procedures. Finally, § 120.1300 would implement the new legislation providing that 7(a) Lenders could appeal informal enforcement actions to Federal district court or OHA. The informal enforcement action would remain in effect pending resolution of the appeal, if any. SBA would not be precluded from taking other action, including but not limited to, a formal enforcement action under § 120.1500, or as otherwise authorized by law, while the appeal is pending.

H. Section 120.1400 – Grounds for Enforcement Actions – SBA Lenders. Section 120.1400 sets forth the grounds for SBA's enforcement actions for SBA Lenders. The proposed rule would amend 13 CFR 120.1400 to implement several provisions of the new legislation and to provide clarifications. First, the proposed rule would amend § 120.1400(b) to explicitly state, and thereby formally recognize, that § 120.1400 grounds extend to both informal and formal enforcement actions. Second, in accordance with the new legislation, the proposed rule would state that SBA would consider the severity or frequency of a violation in determining the type of enforcement action to take. Third, § 120.1400(c)(6) would clarify that an action "detrimental to an SBA program" means an action detrimental to "the integrity or reputation of" an SBA program. Further, the proposed rule would also clarify paragraph (c)(9) to further inform the public that SBA considers an SBA Lender's failure to properly oversee Agent activity to be an example of SBA Lender action/inaction that increases SBA's financial risk. While Agents can be

helpful in assisting SBA Lenders in making, servicing, liquidating, and litigating SBA loans, an SBA Lender must prudently oversee third-party activity.<sup>8</sup> SBA's policy of lender responsibility for third-party activity is neither new to the program nor unusual for regulated lenders. For purposes of this section, the term "Agent" means all parties included in the definition of "Agent" in 13 CFR part 103 that assist the 7(a) Lender or CDC with making, servicing, liquidating, or litigating their SBA business loans (e.g., lender service providers, consultants, brokers/referral agents).

SBA would also clarify paragraphs (c)(11) and (12) of this section, which cover grounds for immediate suspension of delegated authority and program authority. Currently, these paragraphs provide for immediate action where it is needed to prevent significant impairment of the 7(a) or 504 Loan Program. The proposed rule would revise these paragraphs to better define the applicable circumstances. The proposed paragraph would state that SBA may take such immediate action upon a determination that: (i) one of the grounds in "(c)" or "(f)" of that section, as applicable, exists; and (ii) immediate action is needed to protect the interests of the Federal Government (such as where there is risk of immediate harm or loss, a significant program integrity concern, or clear evidence of conduct indicating a lack of business integrity). Situations that may warrant immediate suspension may include, but are not limited to, where there are significant findings relating to the SBA Lender's determination of eligibility (e.g., credit elsewhere, etc.) or on the credit review, underwriting, approval, loan servicing and/or liquidation process; evidence of fraud; significant concerns as to the SBA Lender's financial condition,

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<sup>8</sup> In accordance with SOP 50 10 5 (K), Subpart A, Chpt. 1, Para. II.E.1.i, SBA expects lenders to exercise due diligence and oversight of their third-party vendors (e.g., Lender Service Providers and other loan agents), including having written policies governing such relationships and monitoring the performance of their vendors. SBA will review such due diligence when conducting lender oversight activities.

capital levels, or solvency; or where an SBA Lender is no longer licensed or lacks staff capable of making, servicing, or liquidating loans, as determined by SBA in its discretion. In addition, the revisions to paragraphs (d)(1)(iii) and (d)(3)(i) and (ii) would clarify that an SBA Supervised Lender's violation of "the Small Business Act" or "SBA regulations" is a violation of "Loan Program Requirements". This is consistent with SBA's use of this term in § 120.1400(c)(2) on noncompliance as a ground for enforcement action against SBA Lenders. In conjunction with this conforming change, SBA proposes deleting the word "agreement" from paragraph (d)(1)(iv) as it would be redundant with paragraph (d)(1)(iii) as revised.

I. Section 120.1425 - Grounds for Enforcement Actions—Intermediaries

Participating in the Microloan Program. The proposed rule would update § 120.1425 to remove references to NTAPs. Paragraph (c)(1) and (c)(2)(vii) on violations of law and Loan Program Requirements would be clarified and harmonized with the corresponding provision for SBA Lenders. In addition, SBA would reorder some of the grounds within the regulation and provide for more logical grouping. SBA would also add an additional performance-related ground for enforcement action: a failure to "[m]aintain the financial ability to sustain the Intermediary's operations (including, but not limited to, adequate capital), as determined by SBA". Maintenance of financial condition is important to an Intermediary's ability to continue to make small business loans and repay its Promissory Note(s) to SBA. Consistent with equivalent provisions for SBA Lenders, SBA would add two general grounds to the Microloan Program regulations: (i) failure to take corrective actions and (ii) engaging in uncooperative or detrimental behavior; as well as a specific

ground for immediate suspension of Intermediaries. Finally, SBA would add a catch-all provision, paragraph (c)(7), for other grounds otherwise authorized by law.

J. Section 120.1500 – Types of Formal Enforcement Actions – SBA Lenders.

Proposed revisions to § 120.1500 would implement the new legislative provision on civil monetary penalties as an enforcement tool for 7(a) Lenders. CMPs create a monetary incentive for 7(a) Lenders to comply with SBA Loan Program Requirements. This tool could be particularly effective as a deterrent against financial related non-compliance (e.g., nonpayment or delay in payment of amounts owed to SBA for borrower payments, recoveries received, or fees owed). CMPs may also be warranted in certain critical circumstances (e.g., where there is violation of an order, directive, or agreement, or fraud). SBA might also use CMPs where there are reporting failures or delays (other than those provided for in 13 CFR 120.465). These examples are not all inclusive. The proposed provision would include a list of considerations for SBA in determining whether and in what amount to assess a CMP. Those considerations are the same as those in 13 CFR 120.465(b) governing CMPs for reporting failures against SBA Supervised Lenders. The considerations/factors would include, but are not limited to, the following: the gravity (e.g., severity and frequency) of the violation; history of violations; financial resources and good faith of the 7(a) Lender; and such other factors as justice may require. The list of considerations is also very similar to those in the CMP structures of other Federal agencies, including regulators with broad authority, such as the Office of Comptroller of the Currency and the Federal Deposit Insurance Corporation, as well as regulators with a narrower purview over loan guarantee programs, such as the Department of Housing and Urban Development's Mortgage Review Board. SBA

assessment of CMPs, as with SBA's other enforcement tools, would help to protect the integrity of the 7(a) Loan Program. In addition to the incorporation of CMPs, proposed § 120.1500 would reference the Lender Oversight Committee's role in formal enforcement actions, with their responsibilities set forth in Delegations of Authority and as authorized by the Act. Finally, § 120.1500 would include a technical amendment to include the term "formal" before "enforcement action" to distinguish the section from new § 120.1300 on informal enforcement actions.

K. Section 120.1540 - Types of Formal Enforcement Actions – Intermediaries. The proposed rule would update § 120.1540 to delete references to NTAPs. It would also include a technical amendment to include the term "formal" before "enforcement action" to distinguish the actions under this section from informal enforcement actions for Intermediaries set forth in SOP 50 53. The proposed regulation would revise the provision on suspension and pre-revocation sanctions to more closely conform with the suspension provision for SBA Lenders. Specifically, proposed § 120.1540 would provide that suspension may include, but is not limited to, suspension of the authority to make, service, liquidate, and/or litigate SBA microloans. It may also include a freeze on an Intermediary's Microloan Revolving Fund ("MRF") and Loan Loss Reserve Fund ("LLRF") accounts. Finally, proposed § 120.1540 would specify that SBA may undertake an "immediate" suspension action<sup>9</sup> (i.e., a suspension that is effective immediately), and that revocation actions may include a portfolio surrender.

L. Section 120.1600 – General Procedures for Formal Enforcement Actions Against SBA Lenders, SBA Supervised Lenders, Other Regulated SBLCs, Management Officials, Other Persons, and Intermediaries. Proposed changes to § 120.1600 would include a

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<sup>9</sup> Intermediary suspensions, like those for SBA Lenders, may be "proposed" or "immediate".



technical amendment to add the term “formal” before enforcement action in this section. It would also include a technical amendment that references alternate procedures under law, including but not limited to, those under current § 120.465 governing procedures for assessing CMPs against SBA Supervised Lenders for reporting failures. Section 120.1600 would be updated further to remove NTAPs from the regulation. In addition, the proposed rule would implement new legislation on enforcement action appeals. Specifically, 7(a) Lenders could appeal most formal enforcement actions to OHA or proceed directly to the appropriate Federal district court. Excluded are those formal enforcement actions against SBA Supervised Lenders under §§ 120.1500(c) and (d) and 120.465 because the statutory provisions in 15 U.S.C. 650 provide for separate procedures, which are covered in § 120.1600(b) or (c) and § 120.465. Any available OHA appeal would have to be submitted within 20 calendar days of the decision. The enforcement action would remain in effect pending resolution of any appeal.

M. Section 134.102 – Jurisdiction of OHA. The proposed rule would amend § 134.102(d), which is currently reserved, to provide OHA jurisdiction to hear appeals of enforcement actions against 7(a) Lenders, as contemplated by the new legislation. Such jurisdiction does not include appeals for certain actions against SBA Supervised Lenders under § 120.1600(b) or (c) and § 120.465 (including, but not limited to, Cease and Desist Orders, Suspensions, and Revocations) as those procedures are provided for separately in 15 U.S.C. 650 as discussed above.

N. Section 134.205 – The appeal file, confidential information, and protective orders. Title 13 CFR 134.205 governs the appeal file, confidential information, and protective orders when an action is appealed to OHA. Paragraph (c) lists types of information in the

appeal file that are exempt from public access. The exempt information includes, but is not limited to, sensitive, confidential and other exempt information. The proposed rule would add to the list of exempt information, documents and related information covered under 13 CFR 120.1060.

Compliance with Executive Orders 12866, 13563, 12988, 13132, 13771, the Paperwork Reduction Act (44 U.S.C. chapter 35) and the Regulatory Flexibility Act (5 U.S.C. 601-612).

Executive Order 12866.

The Office of Management and Budget (OMB) has determined that this proposed rule is not a “significant” regulatory action for the purposes of Executive Order 12866. In the interest of transparency, however, SBA has drafted a Regulatory Impact Analysis for the public’s information in the next section. This is not a major rule under the Congressional Review Act, 5 U.S.C. 801, et seq.

#### Regulatory Impact Analysis

##### 1. Is there a need for this regulatory action?

Public Law 115-189, the Small Business 7(a) Lending Oversight Reform Act of 2018, requires that SBA issue regulations to carry out certain provisions contained therein. This rule includes proposed regulations that would implement the Act. In addition, the rule would update and clarify certain lender oversight regulations (e.g., remove reference to NTAPs and include some clarifications to better inform the public). The proposed lender oversight rule would strengthen SBA supervision of SBA Lenders, especially 7(a) Lenders, and protect the integrity of SBA’s business loan programs.

##### 2. What are the potential benefits and costs of this regulatory action?

The benefits of the proposed rule would be improved lender oversight that could help reduce unnecessary losses for SBA, SBA Lenders, and Intermediaries. With effective supervision, lenders are provided feedback to assist them in complying with SBA Loan Program Requirements and to promote prudent lending. The updates and clarifications in this proposed rule are intended to reduce uncertainties in order to help avoid unnecessary costs.

SBA does not anticipate any additional costs or impact on the subsidy to operate the business loan programs under the proposed rule. Most of the revisions codify current practices. Further, the Agency also does not, apart from the civil monetary penalties, expect additional costs to lenders from the provisions that implement the legislation. Regarding the CMPs for 7(a) Lenders, the CMPs are statutorily authorized and limited to \$250,000, subject to annual adjustments in accordance with section 701 of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. 114-74 (November 2, 2015). SBA anticipates that 7(a) Lenders will take corrective actions expeditiously, and as a result, few CMPs may need to be administered. SBA does not anticipate any additional costs from the technical corrections or clarifications as these specify actions that lenders should already be taking (e.g., implementing corrective actions required within the requisite 90 days, adequately training staff, maintaining loan file documentation consistent with prudent lending, and adhering to all other SBA requirements).

### 3. What alternatives have been considered?

Since the proposed rule would primarily implement statutory provisions, the Agency is somewhat limited in its alternatives. Regarding CMPs for 7(a) Lenders, the

Agency researched the CMP structures of other agencies, including the banking agencies and other Federal guaranteed loan programs. We found that these CMP structures are typically very complex and may be tiered due to detailed statutory schemes, with the potential for maximum CMPs that are several times larger than SBA's. This is very different from the general CMP authority that Congress provided to SBA. Therefore, SBA did not opt for a complex cumbersome structure. SBA, however, included in its proposal factors similar to those in the banking agencies' CMP regulations, the Department of Housing and Urban Development's CMP regulations,<sup>10</sup> and current § 120.465 that allow for consideration of the facts and circumstances of the underlying activity. Under the proposed rule, SBA would consider the following factors in determining whether and in what amount SBA would assess CMPs against 7(a) Lenders: the gravity (e.g., severity and frequency) of the violations; history of violations; financial resources and good faith of the 7(a) Lender; and such other factors as justice may require. The Agency will also consider alternatives proposed in public comments and suggestions on how SBA can otherwise implement the statutory provisions responsibly without compromising the improvements to supervision intended by the legislation.

#### Executive Order 13563.

Executive Order 13563 supplements and reaffirms the principles and requirements of Executive Order 12866, including providing the public notice and an opportunity to comment on regulatory changes. Consistent with the requirements of that executive order, a description of the need for this regulatory action and the benefits and costs associated with this action - including distributional impacts - if any, are contained above in the Regulatory Impact Analysis provided for Executive Order 12866. The

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<sup>10</sup> See, 24 CFR 30.80.

Agency has participated in public forums and meetings that have included outreach to hundreds of its lending partners to seek valuable insight and suggestions for the program. These forums include, but are not limited to, the National Association of Government Guaranteed Lenders Technical Conference; the Southeast Regional Lenders' Conference; and the Mid-America Lenders' Conference.

Executive Order 12988.

This action meets applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action would not have retroactive or preemptive effect.

Executive Order 13132.

SBA has determined that this proposed rule would not have substantial, direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, for the purposes of Executive Order 13132, SBA has determined that this proposed rule has no federalism implications warranting preparation of a federalism assessment.

Executive Order 13771.

This proposed rule is not expected to be an Executive Order 13771 regulatory action because this proposed rule is not significant under Executive Order 12866.

Paperwork Reduction Act, 44 U.S.C., Ch. 35.

SBA has determined that this proposed rule would not impose additional recordkeeping or reporting requirements under the Paperwork Reduction Act (PRA). The

only provision relating to recordkeeping is the proposed revision to § 120.180, in which SBA would clarify that SBA Lenders and Intermediaries must maintain documentation to support compliance with SBA Loan Program Requirements. Recordkeeping and reporting associated with this provision would be covered by currently approved information collections for SBA's business loan programs, including but not limited to, collections under OMB Control Numbers 3245-0071, Application for section 504 Loan (SBA Forms 1244 and 2450); 3245-0074, Certified Development Company (CDC) Annual Report Guide (SBA Form 1253); 3245-0080 and 0178, Statement of Personal History (SBA Forms 1081 and 912); 3245-0131, Transaction Report on Loans Serviced by Lender (SBA Form 172); 3245-0132, Lender's Transcript of Account (SBA Form 1149); 3245-0201, Compensation Agreement (SBA Form 159); 3245-0346, PCLP Quarterly Loan Loss Reserve Report and PCLP Guarantee Request (SBA Forms 2233 and 2234 A, B, and C); 3245-0348, Borrower Information Form (SBA Form 1919), Lenders Application for Guaranty (SBA Form 1920), Religious Eligibility Worksheet (SBA Form 1971), 7(a) Loan Post Approval Action Checklist (SBA Form 2237); 3245-0352, Microloan Program Electronic Reporting System (MPERS) (MPERSsystem); and 3245-0365, SBA Lender, Microloan Intermediary and NTAP Reporting Requirements. Prudent lenders should already be maintaining such documentation.

Regulatory Flexibility Act, 5 U.S.C. 601-612.

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612, requires the agency to "prepare and make available for public comment an initial regulatory analysis" which will "describe the impact of the proposed rule on small entities." Section 605 of the RFA allows an agency to certify a rule, in lieu

of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

The changes in the proposed rule would generally fall into one of two categories: (i) technical amendments/clarifications or (ii) codifications of the new legislation or existing practices. Examples of the technical amendments and clarifications would include the proposed change to: the § 120.10 definition for Federal Financial Institution Regulator to delete reference to the Office of Thrift Supervision, which was merged into other Federal banking agencies; the proposed removal of references to NTAPs in 120.1000, 120.1010, 120.1015, 120.1025, 120.1050, 120.1051, 120.1055, 120.1060, 120.1425, 120.1540, and 120.1600 as SBA has not issued technical assistance grants to NTAPs in many years and such assistance is being administered directly by Microloan Intermediaries; and the proposed incorporation into § 120.180 of the current requirement that Intermediaries must comply with the Microloan Program requirements.

Although the technical corrections/clarifications portion of the proposed rule might affect some of the approximately 3,500 7(a) Lenders (approximately 2000 of which are small ); 213 CDCs (all of which are small); and 147 Microloan Intermediaries (all of which are small), SBA does not believe it would have a significant economic impact on those small entities. Rather, the clarifications to some extent might even reduce the burdens by better informing SBA Lenders and Intermediaries of how the Agency may apply a regulation or requirement. As such, SBA Lenders and Intermediaries may potentially avoid the need to spend extra time and resources interpreting the regulations.

The second category consists of regulation changes in the rule that would codify or implement the new legislation or existing practices. Examples of the regulations and their changes that would codify or implement the new legislation include: the § 120.101 incorporation of the new statutory definition for credit elsewhere; the § 120.1055 revision to the timeframe from 30 to 45 days for an SBA Lender or Intermediary to respond to findings and corrective actions; the §§ 120.1300, 120.1600, and 134.102 inclusion of an OHA appeal for a 7(a) Lender enforcement action; and the § 120.1500(b) addition of CMPs for a 7(a) Lender. Examples of regulations and their changes that would codify current practices and procedures include: the § 120.1055 (90 day) addition of a timeframe for implementation of corrective actions; the § 120.1300 inclusion of voluntary agreements and Board Resolutions as informal enforcement actions; and the application in § 120.1400 of the same grounds for informal as formal enforcement actions for an SBA Lender.

While a few of the codifying provisions might have the potential of a significant economic impact, SBA does not expect that it would impact a substantial number of small businesses. In particular, SBA does not anticipate that any changes to the enforcement regulations, including the incorporation of a CMP for 7(a) Lenders in proposed § 120.1500(b), would be burdensome to a substantial number of small lenders. This is because SBA has historically taken only a small number of enforcement actions. The Agency seeks to educate and work with SBA Lenders and Intermediaries using graduated processes for the entity to reduce risk and come into compliance. Specifically, SBA educates SBA Lenders and Intermediaries on SBA Loan Program Requirements through notices, webinar and teleconference training venues, and at conferences. When



SBA identifies risk or noncompliance through monitoring or reviews, SBA generally seeks to work with the SBA Lender or Intermediary through the corrective action process or increased supervision to address SBA concerns. As a result, most SBA Lenders and Intermediaries come into compliance and avoid facing enforcement actions.

SBA generally takes enforcement action only when the entity cannot sufficiently reduce risk, cannot correct serious noncompliance, or where the entity does not have the willingness or ability to correct. In FY 2018, SBA took nine enforcement actions against SBA Lenders and Intermediaries, which is not a substantial number.

One of the proposed rule changes to SBA's enforcement regulations would be the CMP provisions. The CMP provisions would be applicable only to 7(a) Lenders and by statute could be assessed in an enforcement action up to \$250,000. As proposed, the CMP provisions would provide flexibility to allow SBA to take into account factors, including the financial resources of a 7(a) Lender (especially for small lenders), in determining whether and in what amount to assess a CMP.

SBA believes these provisions would not have a significant impact on a substantial number of small 7(a) Lenders, as most 7(a) Lenders generally comply with SBA Loan Program Requirements. In fact, only five enforcement actions in FY 2018 were taken against 7(a) Lenders. Therefore, we do not anticipate that SBA would need to assess CMPs with any frequency. Further, given the flexibility in determining the amount of the penalty, even if imposed, the proposed penalty could be assessed in an amount much less than \$250,000.

For the reasons stated above, SBA certifies that this action would not have a significant economic impact on a substantial number of small entities. SBA invites comment from members of the public.

List of Subjects.

13 CFR Part 120

Community development, Loan programs-business, Small businesses.

13 CFR Part 134

Appeal Procedures, Confidential business information.

For the reasons stated in the preamble, SBA proposes to amend 13 CFR parts 120 and 134 as follows:

**PART 120 – BUSINESS LOANS**

1. The authority citation for part 120 is revised to read as follows:

Authority: 15 U.S.C. 634(b) (6), (b) (7), (b) (14), (h), and note, 636(a), (h) and (m), and note, 650, 657t, and note, 657u, and note, 687(f), 696(3) and (7), and note, and 697(a) and (e); and note.

2. Amend § 120.10 by revising the definitions for “Federal Financial Institution Regulator”, “Lender Oversight Committee”, and “Loan Program Requirements” to read as follows:

§ 120.10 Definitions.

\* \* \* \* \*

*Federal Financial Institution Regulator* is the Federal banking regulator of a 7(a) Lender and may include the Federal Deposit Insurance Corporation, the Federal Reserve Board, the Office of the Comptroller of the Currency, the National Credit Union Administration, and the Farm Credit Administration.

\* \* \* \* \*

*Lender Oversight Committee (“LOC”)* is a committee established within SBA by legislation, which meets at least quarterly, and which has the membership and duties set forth in the Small Business Act as further outlined in Delegations of Authority published in the Federal Register. The LOC’s duties include, but are not limited to, reviewing and voting on formal enforcement action recommendations.

\* \* \* \* \*

*Loan Program Requirements* or *SBA Loan Program Requirements* are requirements imposed upon Lenders, CDCs, or Intermediaries by statute; SBA and applicable government-wide regulations; any agreement the Lender, CDC, or Intermediary has executed with SBA; SBA SOPs; Federal Register notices; official SBA notices and forms applicable to the 7(a) Loan Program, 504 Loan Program or Microloan Program; and loan authorizations, as such requirements are issued and revised by SBA from time to time. For CDCs, this term also includes requirements imposed by Debentures, as that term is defined in § 120.802. For Intermediaries, this term also includes requirements imposed by promissory notes, collateral documents, and grant agreements.

\* \* \* \* \*

3. Amend § 120.101 by revising the first and second sentences to read as follows:

§ 120.101 Credit not available elsewhere.

SBA provides business loan assistance only to applicants for whom the desired credit is not otherwise available on reasonable terms from non-Federal, non-State, and non-local government sources. SBA requires the Lender or CDC to certify or otherwise

show that the desired credit is unavailable to the applicant on reasonable terms and conditions from non-Federal, non-State, and non-local government sources without SBA assistance, taking into consideration factors associated with conventional lending practices, including: the business industry of the loan applicant; whether the loan applicant has been in operation two years or less; the adequacy of collateral available to secure the loan; the loan term necessary to reasonably assure repayment of the loan from business cash flow; and any other factor relating to the particular loan application that cannot be overcome except through obtaining a Federal loan guarantee under prudent lending standards. \* \* \*

4. Revise § 120.180 to read as follows:

§ 120.180 Compliance with Loan Program Requirements.

SBA Lenders and Intermediaries must comply and maintain familiarity with Loan Program Requirements for the 7(a) Loan Program, 504 Loan Program, and the Microloan Program, as applicable, and as such requirements are revised from time to time. Loan Program Requirements in effect at the time that an SBA Lender or Intermediary takes an action in connection with a particular loan govern that specific action. For example, although loan closing requirements in effect when an SBA Lender closes a loan will govern the closing actions, an SBA Lender's liquidation actions on the same loan are subject to the liquidation requirements in effect at the time that a liquidation action is taken. An SBA Lender or Intermediary must maintain sufficient documentation to demonstrate that Loan Program Requirements have been satisfied.

5. Revise § 120.1000 to read as follows:

§ 120.1000 Risk-Based Lender Oversight.

(a) *Risk-Based Lender Oversight*. SBA monitors, supervises, examines, regulates, and enforces laws against, SBA Supervised Lenders and the SBA operations of SBA Lenders and Intermediaries.

(b) *Scope*. Most rules and standards set forth in this subpart apply to SBA Lenders as well as Intermediaries; however, SBA has separate regulations for enforcement grounds and formal enforcement actions for Intermediaries at §§ 120.1425 and 120.1540.

§ 120.1010 [Amended]

6. Amend § 120.1010 by removing the phrase “SBA Lender, Intermediary, and NTAP” and adding in its place the phrase “SBA Lender and Intermediary”.

§ 120.1015 [Amended]

7. Amend § 120.1015 by removing the phrase “SBA Lenders, Intermediaries, and NTAPs” wherever it appears and adding in its place the phrase “SBA Lenders and Intermediaries”.

8. Revise § 120.1025 to read as follows:

§ 120.1025 Monitoring.

SBA may conduct monitoring of SBA Lenders and Intermediaries including, but not limited to, SBA Lenders' or Intermediaries' self-assessments.

§ 120.1050 [Amended]

9. In § 120.1050(c), remove the phrase “and NTAPs” wherever it appears.

10. In § 120.1051, revise the first sentence of the introductory text and paragraph (a) to read as follows:

§ 120.1051 Frequency of reviews and examinations.

SBA may conduct reviews and examinations of SBA Lenders and Intermediaries on a periodic basis. \* \* \*

(a) Results of monitoring, including an SBA Lender's or Intermediary's Risk Rating;

\* \* \* \* \*

11. Amend § 120.1055 by:

a. Revising paragraphs (a) and (b); and

b. In paragraph (d):

i. Removing the phrase “SBA Lender, Intermediary, or NTAP” wherever it appears and adding in its place the phrase “SBA Lender or Intermediary”;

ii. Removing “Subpart I” and adding in its place “this subpart”; and

iii. Removing the reference “§ 120.1500 through § 120.1540” wherever it appears and adding in its place the phrase “this subpart”.

The revisions to read as follows:

§ 120.1055 Review and examination results.

(a) *Written Reports.* SBA will provide an SBA Lender and Intermediary a copy of SBA's written report prepared as a result of the SBA Lender or Intermediary review or examination (“Report”). The Report may contain findings, conclusions, corrective actions and recommendations. Each director (or manager, in the absence of a Board of Directors) of the SBA Lender or Intermediary, in keeping with his or her responsibilities, must become fully informed regarding the contents of the Report.

(b) *Response to review and examination Reports.* SBA Lenders and Intermediaries must respond to Report findings, recommendations, and corrective

actions, if any, in writing to SBA and, if requested, submit proposed corrective actions and/or a capital restoration plan. An SBA Lender or Intermediary must respond within 45 calendar days from the date the Report is received unless SBA notifies the SBA Lender or Intermediary in writing that the response, proposed corrective actions or capital restoration plan is to be filed within a different time period. The SBA Lender or Intermediary response must address each finding, recommendation, and corrective action. In proposing a corrective action or capital restoration plan, the SBA Lender or Intermediary must detail: the steps it will take to correct the finding(s); the time within which each step will be taken; the timeframe for accomplishing the entire corrective action plan; and the person(s) or department at the SBA Lender or Intermediary charged with carrying out the corrective action or capital restoration plan, as applicable. In addition, SBA Lenders and Intermediaries must implement corrective actions within 90 calendar days from the date the Report or SBA's letter requiring corrective action is received, unless SBA provides written notice of another timeframe. For purposes of this paragraph, a Report will be deemed to have been received on the date it was emailed to the last known email address of the SBA Lender or Intermediary unless the SBA Lender or Intermediary can provide compelling evidence to the contrary.

\* \* \* \* \*

§ 120.1060 [Amended]

12. Amend § 120.1060 by:

i. Removing the phrase "SBA Lender, Intermediary, and NTAP" wherever it appears and adding in its place the phrase "SBA Lender and Intermediary";

ii. Removing the phrase “SBA Lenders, Intermediaries, and NTAPs” and adding in its place the phrase “SBA Lenders and Intermediaries”;

iii. Removing the phrase “SBA Lender’s, Intermediary’s, or NTAP’s” and adding in its place the phrase “SBA Lender’s or Intermediary’s”;

iv. Removing the phrase “SBA Lender, Intermediary, or NTAP” and adding in its place the phrase “SBA Lender or Intermediary”.

13. Add § 120.1300 immediately following the undesignated center heading “Enforcement Actions” to read as follows:

§ 120.1300 Informal enforcement actions – 7(a) Lenders.

(a) Upon a determination that the grounds in § 120.1400 exist, SBA may undertake, in SBA's discretion, one or more of the informal enforcement actions listed in this section. SBA will consider the severity or frequency of the violation or action triggering the ground and the circumstances in determining whether and what type of informal action to take. Circumstances that may lead to SBA taking informal enforcement action rather than formal enforcement action include, for example, when problems are narrow in scope and are correctible and SBA is confident of a 7(a) Lender’s Board of Directors (“Board”) and management commitment and ability to correct; where violations are less frequent or less severe but warrant enforcement; or while more fully assessing risk.

(b) Informal enforcement actions include, but are not limited to:

(1) *An SBA supervisory letter.* The letter may discuss serious or persistent supervisory concerns, as determined by SBA, and expected corrective action by the 7(a) Lender. Supervisory letters include, for example, Notices of Material Non-Compliance;



(2) *Mandatory training.* SBA may require a 7(a) Lender to complete training to address certain findings, weaknesses, and deficiencies;

(3) *A commitment letter or Board resolution.* SBA may require a 7(a) Lender to submit a commitment letter or Board resolution, satisfactory to SBA, signed by the 7(a) Lender's Board on behalf of the entity that may:

(i) Include specific written commitments to take corrective actions in response to the 7(a) Lender's acknowledged deficiencies;

(ii) Identify the person(s) responsible for taking the corrective action; and

(iii) Set forth the timeframe for taking the corrective action. The document may be drafted by SBA or the 7(a) Lender;

(4) *Agreements.* SBA may request that a 7(a) Lender enter into a written agreement with, and drafted by, SBA to address and correct identified weaknesses and/or limit or mitigate risk. The agreement may provide, for example, that a 7(a) Lender take certain actions or refrain from certain actions; and

(5) *Other informal enforcement actions.* Others as SBA determines appropriate on a case by case basis.

(c) A 7(a) Lender may appeal informal enforcement actions to the appropriate Federal district court or SBA's Office of Hearings and Appeals (OHA) within 20 calendar days of the date of the decision, and in the event of an OHA appeal, OHA will issue its decision in accordance with part 134 of this title. The enforcement action will remain in effect pending resolution of the appeal, if any. SBA is not precluded from taking one or more formal enforcement actions under § 120.1500, or as otherwise authorized by law, while an appeal of an informal enforcement action is pending.

14. Amend § 120.1400 by revising the first sentence and adding a sixth sentence in paragraph (b) and revising the first sentence in paragraph (c)(6) and paragraphs (c)(9), (11), and (12), (d)(1)(iii) and (iv), and (d)(3)(i) and (ii) to read as follows:

§ 120.1400 Grounds for enforcement actions—SBA Lenders.

\* \* \* \* \*

(b) *Scope.* SBA may undertake one or more of the enforcement actions listed in §§ 120.1300 and 120.1500, or as otherwise authorized by law, if SBA determines that the grounds applicable to the enforcement action exist. \* \* \* SBA considers the severity or frequency of a violation in determining whether to take an enforcement action and the type of enforcement action to take.

(c) \* \* \*

(6) Engaging in a pattern of uncooperative behavior or taking an action that SBA determines is detrimental to the integrity or reputation of an SBA program, that undermines management or administration of a program, or that is not consistent with standards of good conduct. \* \* \*

\* \* \* \* \*

(9) Any other reason that SBA determines may increase SBA's financial risk (for example, repeated Less Than Acceptable Risk Ratings (generally in conjunction with other indicators of increased financial risk); failure to properly oversee Agent activity (“Agent” as defined in part 103 of this title); or, indictment on felony or fraud charges of an officer, key employee, or loan agent involved with SBA loans for the SBA Lender);

\* \* \* \* \*

(11) For immediate suspension of all SBA Lenders from delegated authorities—upon a determination by SBA that:

(i) One or more of the grounds in paragraph (c) or (f) of this section, as applicable, exists; and

(ii) Immediate action is needed to protect the interests of the Federal Government (such as where there is risk of immediate harm or loss, a significant program integrity concern, or clear evidence of conduct indicating a lack of business integrity).

(12) For immediate suspension of all SBA Lenders (except SBA Supervised Lenders, which are covered under § 120.1400(d)(2)) from the authority to participate in the SBA loan program, including the authority to make, service, liquidate, or litigate 7(a) or 504 loans—upon a determination by SBA that:

(i) One or more of the grounds in paragraph (c) or (f) of this section, as applicable, exists; and

(ii) Immediate action is needed to protect the interests of the Federal Government (such as where there is risk of immediate harm or loss, a significant program integrity concern, or clear evidence of conduct indicating a lack of business integrity).

(d) \* \* \*

(1) \* \* \*

(iii) A willful or repeated violation of SBA Loan Program Requirements; or

(iv) A willful or repeated violation of any condition imposed by SBA with respect to any application or request with SBA; or

\* \* \* \* \*

(3) \* \* \*

- (i) A violation of SBA Loan Program Requirements; or
- (ii) Where an SBA Supervised Lender or Other Person engages in or is about to engage in any acts or practices that will violate SBA Loan Program Requirements.

\* \* \* \* \*

15. Amend § 120.1425 by:

- a. Revising the section heading and paragraphs (a), and (b);
- b. In paragraph (c) introductory text:
  - i. Removing the dash after the paragraph heading and adding a period in its place; and
  - ii. Removing the phrase “Intermediary or NTAP” wherever it appears and adding in its place the phrase “Intermediary”;
- c. Revising paragraph (c)(1);
- d. Removing the phrase “Intermediaries and NTAPs” and adding in its place the phrase “Intermediaries” in paragraph (c)(2)(i);
- e. Revising paragraphs (c)(2)(vii) and (viii);
- f. Adding paragraphs (c)(2)(ix) and (x) and (c)(3) through (7);
- g. Removing paragraphs (d) and (e).

The revisions and additions read as follows:

§ 120.1425 Grounds for formal enforcement actions—Intermediaries participating in the Microloan Program.

(a) *Agreement.* By participating in the SBA Microloan Program, Intermediaries automatically agree to the terms, conditions, and remedies in this part as if fully set forth

in their participation agreement and all other agreements jointly executed by the Intermediary and SBA.

(b) *Scope.* SBA may undertake one or more of the formal enforcement actions listed in § 120.1540, or as otherwise authorized by law, if SBA determines that any of the grounds listed in paragraph (c) of this section exist.

(c) \* \* \*

(1) Failure to comply materially with any requirement imposed by Loan Program Requirements;

(2) \* \* \*

(vii) Maintain a staff trained in Microloan Program issues and Loan Program Requirements;

(viii) Maintain the financial ability to sustain the Intermediary's operations (including, but not limited to, adequate capital), as determined by SBA;

(ix) Satisfactorily provide in-house technical assistance to Microloan borrowers and prospective Microloan borrowers; or

(x) Close and fund the required number of microloans per year under § 120.716;

(3) Failure within the time period specified to correct an underwriting, closing, disbursing, servicing, liquidation, litigation, or reporting deficiency, or failure in any material respect to take other corrective action, after receiving notice from SBA of a deficiency and the need to take corrective action;

(4) Engaging in a pattern of uncooperative behavior or taking an action that SBA determines is detrimental to the integrity or reputation of the Microloan Program, that undermines management or administration of the program, or that is not consistent with

standards of good conduct. Prior to issuing a notice of a proposed formal enforcement action or immediate suspension under § 120.1540 based upon the grounds discussed in this paragraph, SBA must send prior written notice to the Intermediary explaining why the Intermediary's actions were uncooperative, detrimental to the program, undermined SBA's management of the program, or were not consistent with standards of good conduct. The prior notice must also state that the Intermediary's actions could give rise to a specified formal enforcement action, and provide the Intermediary with a reasonable time to cure the deficiency before any further action is taken;

(5) Any other reason that SBA determines may increase SBA's financial or program risk (for example, repeated Less Than Acceptable Risk Ratings (generally in conjunction with other indicators of increased risk) or indictment on felony or fraud charges of an officer, key employee, or loan agent involved with SBA programs for the Intermediary);

(6) For immediate suspension of an Intermediary – upon a determination by SBA that:

(i) One or more of the grounds in paragraph (c) of this section exists; and

(ii) Immediate action is needed to protect the interests of the Federal Government (such as where there is risk of immediate harm or loss, a significant program integrity concern, or clear evidence of conduct indicating a lack of business integrity); and

(7) As otherwise authorized by law.

16. Amend § 120.1500 by revising the section heading, the introductory text, paragraph (a) heading, paragraph (b), paragraph (c) introductory text heading, paragraph

(c)(4), paragraph (d) introductory text heading, and paragraph (e) introductory text heading to read as follows:

§ 120.1500 Types of formal enforcement actions—SBA Lenders.

Upon a determination that the grounds set forth in § 120.1400 exist, SBA may undertake, in SBA's discretion (and with the involvement of the Lender Oversight Committee as appropriate and consistent with its assigned responsibilities), one or more of the following formal enforcement actions for each of the types of SBA Lender listed. SBA will consider the severity or frequency of the violation or action and the circumstances triggering the ground in determining whether and what type of enforcement action to take. SBA will take formal enforcement action in accordance with procedures set forth in § 120.1600. If formal enforcement action is taken under this section and the SBA Lender fails to implement required corrective action in any material respect within the required timeframe in response to the formal enforcement action, SBA may take further enforcement action, as authorized by law. SBA's decision to take a formal enforcement action will not, by itself, invalidate a guaranty previously provided by SBA.

(a) *Formal enforcement actions for all SBA Lenders.* \* \* \*

(b) *Formal enforcement actions specific to 7(a) Lenders.* In addition to those formal enforcement actions applicable to all SBA Lenders, SBA may take the following actions:

(1) Secondary market suspension or revocation (other than temporary suspension and revocation under § 120.660). SBA may suspend or revoke a 7(a) Lender's authority to sell or purchase loans or certificates in the Secondary Market; or

(2) Civil monetary penalty (other than SBA Supervised Lender civil monetary penalty under § 120.465). SBA may assess a civil monetary penalty against a 7(a) Lender. The civil monetary penalty will be in an amount not to exceed the maximum published in the Federal Register from time to time. In determining whether to assess a civil monetary penalty and, if so, in what amount, SBA may consider, for example, the following: the gravity (e.g., severity and frequency) of the violation; the history of previous violations; the financial resources and good faith of the 7(a) Lender; and any other matters as justice may require.

*(c) Formal enforcement actions specific to SBA Supervised Lenders and Other Persons (except Other Regulated SBLCs). \* \* \**

(4) *Civil monetary penalties for report filing failure under § 120.465.* SBA may seek civil penalties, in accordance with § 120.465, against an SBA Supervised Lender that fails to file any regular or special report by its due date as specified by regulation or SBA written directive.

*(d) Formal enforcement actions specific to SBLCs. \* \* \**

*(e) Formal enforcement actions specific to CDCs. \* \* \**

17. Revise § 120.1540 to read as follows:

§ 120.1540 Types of formal enforcement actions—Intermediaries participating in the Microloan Program.

Upon a determination that any ground set out in § 120.1425 exists, the SBA may take, in its discretion, one or more of the following formal enforcement actions against an Intermediary:



(a) *Suspension.* SBA may suspend an Intermediary's authority to participate in the Microloan Program, which may include, but is not limited to, the authority to make, service, liquidate, and/or litigate SBA microloans, and the imposition of a freeze on the Intermediary's MRF and LLRF accounts.

(b) *Immediate suspension.* SBA may suspend, effective immediately, an Intermediary's authority to participate in the Microloan Program, which may include, but is not limited to, the authority to make, service, liquidate, and/or litigate SBA microloans, and the imposition of an immediate freeze on the Intermediary's MRF and LLRF accounts. Section 120.1425(c)(6) sets forth the grounds for SBA Microloan Program immediate suspension of an Intermediary.

(c) *Revocation.* SBA may revoke an Intermediary's authority to participate in the Microloan Program which may include, but is not limited to:

- (1) Removal from the program;
- (2) Liquidation of the Intermediary's MRF and LLRF accounts by SBA, and application of the liquidated funds to any outstanding balance owed to SBA;
- (3) Payment of outstanding debt to SBA by the Intermediary;
- (4) Forfeiture or repayment of any unused grant funds by the Intermediary;
- (5) Debarment of the organization from receipt of Federal funds until loan and grant repayments are met; and
- (6) Surrender of possession of Intermediary's SBA microloan portfolio to SBA, with the microloan portfolio and all associated rights transferred on a permanent basis to SBA, in accordance with SBA's rights as a secured creditor.

(d) *Other actions.* Such other actions available under law.

18. Amend § 120.1600 by:

- a. Removing the phrase “SBA Lender, Intermediary, or NTAP” wherever it appears and adding in its place the phrase “SBA Lender or Intermediary”;
- b. Removing the phrase “SBA Lender, Intermediary, or NTAP’s” wherever it appears and adding in its place the phrase “SBA Lender’s or Intermediary’s”;
- c. Revising the section heading and introductory text to paragraph (a);
- d. Adding the word “formal” before the word “enforcement” wherever it appears in paragraphs (a)(1) through (4).
- e. Removing the phrase “SBA Lender, Intermediary, NTAP or SBA,” and adding in its place the phrase “SBA Lender, Intermediary, or SBA,” in paragraph (a)(1)(ii);
- f. Removing the phrase “final decision” wherever it appears and adding in its place the phrase “final agency decision” in paragraphs (a)(2) through (4);
- g. Revising the headings for paragraphs (a)(3) and (4) and paragraph (a)(5); and
- h. Adding the word “formal” before the word “enforcement” in the headings for paragraphs (b) and (c).

The revisions read as follows:

§ 120.1600 General procedures for formal enforcement actions against SBA Lenders, SBA Supervised Lenders, Other Regulated SBLCs, Management Officials, Other Persons, and Intermediaries.

(a) *In general.* Except as otherwise set forth for the formal enforcement actions listed in paragraphs (a)(6), (b), and (c) of this section and in § 120.465, SBA will follow the procedures listed in this section.

\* \* \* \* \*

(3) *SBA's notice of final agency decision on a formal enforcement action where an SBA Lender or Intermediary filed objection to the proposed action or immediate suspension.* \* \* \*

(4) *SBA's notice of final agency decision on a formal enforcement action where no filed objection or untimely objection not considered.* \* \* \*

(5) *Appeals.* An SBA Lender or Intermediary may appeal the final agency decision to the appropriate Federal district court. Alternatively, 7(a) Lenders may appeal such actions (except for actions against SBA Supervised Lenders that are covered by procedures in § 120.1600(b) or (c) or § 120.465), to SBA's Office of Hearings and Appeals ("OHA") within 20 calendar days of the date of the decision, and in the event of such an appeal, OHA will issue its decision in accordance with part 134 of this title. The enforcement action will remain in effect pending resolution of the appeal, if any.

\* \* \* \* \*

#### PART 134—RULES OF PROCEDURE GOVERNING CASES BEFORE THE OFFICE OF HEARINGS AND APPEALS

19. The authority citation for part 134 is revised to read as follows:

Authority: 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6), 634(i), 637(a), 648(l), 656(i), 657t, and 687(c); 38 U.S.C. 8127(f); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189. Subpart J issued under 38 U.S.C. 8127(f)(8)(B).

Subpart K issued under 38 U.S.C. 8127(f)(8)(A).

20. Amend § 134.102 by adding paragraph (d) to read as follows:

§ 134.102 Jurisdiction of OHA.

\* \* \* \* \*

(d) Appeals from informal and formal enforcement actions against 7(a) Lenders, and any other appeal that is specifically authorized by part 120 of this title, but not including appeals of actions against SBA Supervised Lenders under § 120.1600(b) or (c) or under § 120.465;

\* \* \* \* \*

21. Amend § 134.205 by revising paragraph (c) to read as follows:

§ 134.205 The appeal file, confidential information, and protective orders.

\* \* \* \* \*

(c) *Public access.* Except for confidential business and financial information; source selection sensitive information; income tax returns; documents and information covered under § 120.1060 of this title; and other exempt information, the appeal file is available to the public pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552.

\* \* \* \* \*

Christopher Pilkerton,  
Acting Administrator.

[FR Doc. 2019-12631 Filed: 6/20/2019 8:45 am; Publication Date: 6/21/2019]